80-1737

Office Supreme Court, U.S.
FILED
APR 17 1981
ALEXANDER L. STEVAS,
CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS, PETITIONER

v.

LOUIS H. AIKENS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether a *prima facie* case of employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, was established by a Postal Service employee who showed only that he was black and that he had applied for a promotion for which he was qualified, and that the Postal Service selected another, non-minority, applicant.

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Civil Rights Act of 1964, Title VII, Section 717(a), 42 U.S.C. 2000e-16(a) 2

In the Supreme Court of the United States

OCTOBER TERM, 1980

No.

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS, PETITIONER

v.

LOUIS H. AIKENS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States Postal Service Board of Governors, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. B, *infra*, 2a–21a) is not yet reported. The memorandum opinion of the court of appeals on denial of the petition for rehearing (App. D, *infra*, 23a–27a) is not reported. The opinion of the district court (App. E, *infra*, 28a–36a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, 1a) was entered on July 31, 1980. A petition for rehearing was denied on November 20, 1980 (App. C, *infra*, 22a). On February 10, 1981, Justice Brennan extended the time for filing the petition for a writ of certiorari to and including March 20, 1981. On March 13, 1981, the Chief Justice further

extended the time for filing the petition to and including April 19, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 717(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–16(a), provides in pertinent part:

> All personnel actions affecting employees or applicants for employment * * * in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin.

STATEMENT

Respondent Louis H. Aikens, a black retired employee of the United States Postal Service, brought this Title VII employment discrimination action in the United States District Court for the District of Columbia on February 18, 1977.[1] Among other things, respondent alleged that the Postal Service had discriminated against him on the basis of race by denying him certain details and promotions, in violation of Section 717(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–16(a). Respondent sought relief in the form of retroactive promotions and pay benefits as well as attorneys' fees. The case was tried to the court on January 2–3, 1979, and, on February 26, 1979, the court entered its findings of fact and conclusions of law, holding that respondent had failed to establish a *prima facie* case of racial discrimination. App E, *infra*, 28a–36a.

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[1] Respondent had previously filed an administrative complaint of employment discrimination on January 4, 1974. The Postal Service found the complaint to be without merit after a three-day hearing, and the Appeals Review Board of the United States Civil Service Commission affirmed that decision on January 13, 1977. App. E, *infra*, 29a–30a.

Respondent claimed that the Postal Service had discriminated against him because of his race with respect to the awarding of four promotions and details between February 17, 1973 and January 12, 1974. App. E, *infra*, 29a.[2] The trial court found that respondent was the fifth highest ranking employee in the District of Columbia Post Office in March 1973,[3] and that he had been offered and had declined several promotions and lateral transfers[4] between 1966 and 1974. *Id.* at 30a–31a. The court also found that respondent had failed to produce any evidence to show that he had been treated differently from other employees because of his race. *Id.* at 31a–32a. The court specifically found that "[d]uring the period in question, other blacks as well as whites were promoted or detailed to positions above [respondent's] position," and that "[a]t the present time almost all high level positions are held by blacks." *Ibid.* The court also found that respondent had "produced no credible evidence that he was as qualified or more qualified than other individuals who were detailed or promoted" over him, and that he had "produced no evidence of specific acts of discrimination against him." *Id.* at 32a. Thus, the court held that respondent had failed to establish a *prima facie* case of racial discrimination. *Id.* at 36a.

The court of appeals reversed (App. B, *infra*, 2a–21a), holding that under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), a Title VII plaintiff need not show, as part of a *prima facie* case of promotion discrimination, that he was "'as qualified or more qualified'" than the person actually selected for promotion. App B, *infra*, 9a. The court held that respondent had established a *prima facie* case simply

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[2] Although respondent claimed that he had been discriminated against with respect to other job opportunities, those claims were held to be untimely. *Ibid.* See also App. B, *infra*, 4a & nn.1, 2.

[3] In 1973, postal jobs were reevaluated and reclassified, with the result that other jobs were ranked higher than that which respondent held. App. B, *infra*, 3a.

[4] Respondent refused all lateral transfers despite the fact that such transfers would have broadened his experience and enhanced his chances for promotion. App. E, *infra*, 31a.

because he had shown that he was black, and that he had applied for a position for which he was qualified, and was not selected. *Id.* at 8a. Thus, the court of appeals remanded the case to the district court to determine whether the Postal Service had rebutted respondent's *prima facie* case. *Id.* at 10a–11a.

REASONS FOR GRANTING THE PETITION

The court below held that a Title VII plaintiff alleging discrimination in the promotion context may establish a *prima facie* case simply by showing that he is a member of a protected class, that he applied for a position for which he was minimally qualified, and that the position was awarded to another, non-minority, applicant. This holding is inconsistent with this Court's decision in *Texas Department of Community Affairs* v. *Burdine*, No. 79–1764 (Mar. 4, 1981), because the elements identified by the court of appeals are insufficient in the context to show that the plaintiff "was rejected under circumstances which give rise to an inference of unlawful discrimination" (slip op. 5; footnote omitted). In the promotion context, where many applicants may be minimally qualified for a single vacancy, there is no logical basis for recognizing "a presumption that the employer unlawfully discriminated against the employee" (*ibid.*) whenever an employee shows only that he belongs to a protected class and that he was not selected for a position for which he was minimally qualified. Such a presumption can be created only if the employee shows that his qualifications are at least equal to those of the person selected[5] or if he adduces other proof (which, of course, may be available through discovery) that suggests discrimination. Otherwise, employers might be required to defend numerous lawsuits whenever a promotion decision is made.

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[5] Indeed, since "the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria" (*Texas Department of Community Affairs* v. *Burdine*, *supra*, slip op. 11), a showing that the complainant and the person selected were equally qualified arguably would not in itself create a presumption of a violation.

Moreover, the decision below conflicts with recent decisions of two other courts of appeals. *Hagans* v. *Andrus*, No. 79–4424 (9th Cir. Feb. 5, 1981); *Olson* v. *Philco-Ford*, 531 F.2d 474 (10th Cir. 1976). In both of those cases the plaintiff showed that she was a qualified applicant for a promotion for which a man was selected. Yet in *Olson* the court of appeals affirmed a judgment dismissing the complaint at the conclusion of the plaintiff's evidence for failure to prove a *prima facie* case,[6] and in *Hagans* the court of appeals remanded the case for a determination of whether there was sufficient additional evidence to establish a *prima facie* case.

Review by this Court is therefore warranted. Because the court of appeals did not have the benefit of this Court's opinion in *Burdine*, however, we believe that it would be appropriate to vacate the judgment below and remand for further consideration in light of that decision.

1. This Court first considered the elements of a *prima facie* case under Title VII in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), in which the Court held that the plaintiff had successfully established a *prima facie* case by showing that he was a member of a class protected by Title VII, that he had applied and was rejected for a job for which he was qualified and for which the employer was seeking applicants, and that the employer thereafter left the position unfilled while continuing to seek applicants with the plaintiff's qualifications. *Id.* at 802. The company's decision to leave the position unfilled, rather than hire a concededly qualified applicant, was contrary to common experience (in the absence of discrimination) and therefore gave rise to an inference of discrimination. Such an inference may be made because, as the Court noted in *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978), "we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting."

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[6] We recognize, however, the the plaintiff's evidence in *Olson* included a statement of the employer's reasons for the decision and an attempt to rebut those reasons as pretextual (see 531 F.2d at 477).

The evidence necessary to establish a *prima facie* case of employment discrimination depends upon the particular context in which the discrimination is alleged to have occurred. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 357–358 (1977). In every case, however, the plaintiff must shoulder the burden of adducing "proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." *Furnco Construction Corp.* v. *Waters*, *supra*, 438 U.S. at 579–580.

In *Texas Department of Community Affairs* v. *Burdine*, *supra*, the Court reaffirmed the rationale of these cases by emphasizing that a Title VII plaintiff must establish a *prima facie* case, not by invocation of some formalistic test, but by showing that he was rejected "under circumstances which give rise to an inference of unlawful discrimination" (slip op. 5; footnote omitted). The Court further explained that such evidence must be sufficient to "create[ ] a presumption that the employer unlawfully discriminated against the employee" (*ibid.*). And, for the first time, the Court specified: "[i]f the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case" (*id.* at 5–6). An accompanying footnote explained that "[t]he phrase 'prima facie case'" is intended in this context to "denote * * * the establishment of a legally mandatory, rebuttable presumption," rather than merely a "plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue" (*id.* at 6 n.7).

2. The court below attempted to define the elements of a *prima facie* case in promotion disputes by a mechanical extension of the *McDonnell Douglas* test to the promotion context, rather than by ascertaining whether the elements that it identified were sufficient to create that presumption of discrimination which is the essence of any *prima facie* case of employment discrimination. When judged against the latter standard, the *prima facie* case defined by the court of appeals falls far short of the mark.

Essentially, the court below held that respondent had established a *prima facie* case because he had shown that he possessed the minimum qualifications for positions that were instead filled by whites. The court said (App. B, *infra*, 6a; footnote omitted):

> On the record in this case, it is clear that Aikens met the first, third and fourth elements of the test set forth in *McDonnell Douglas*: he is a black man; he sought promotion to higher level positions that became available, and white Post Office employees received the positions. Therefore, it is the second element of the test, having to do with Aikens' qualifications to perform the jobs here in question, that must be addressed in our consideration of this appeal.
>
> Upon review of the evidence submitted to the District Court, we are convinced that Aikens offered ample evidence, which was not contested, to demonstrate his qualifications to perform the work in issue.

The flaw in the court's analysis stems from its failure to consider whether the elements it identified are sufficient, by themselves, to show that respondent's rejection occurred "under circumstances which give rise to an inference of unlawful discrimination." *Texas Department of Community Affairs* v. *Burdine*, *supra*, slip op. 5 (footnote omitted). Respondent did not show that his qualifications were equal to or better than those of the persons selected in his stead, nor did he point to any other facts suggesting that discrimination played any part in these decisions. In fact, the district court specifically found that blacks as well as whites were promoted over respondent, and that there was a "considerable increase" in the number of blacks holding high positions in the Post Office during the relevant time period (App. E, *infra*, 32a).

In the promotion context, numerous minimally qualified candidates may have applied for a single job. Neither logic nor experience supports a presumption of discrimination merely because a qualified disappointed applicant and the qualified individual selected for promotion belong to differ-

ent classes in terms of sex, race, religion or national origin.[7] See, *e.g.*, *Hagans* v. *Andrus*, *supra*; *Olson* v. *Philco-Ford*, *supra*, 531 F.2d at 478. Indeed, there is no reason to assume, in the absence of other evidence,[8] that the employer

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[7]The far reaching implications of the hold below are illustrated by *Daye* v. *Harris*, No. 79-2371 (D.C. Cir. Jan. 15, 1981), in which the court relied on its decision in this case to hold that an unsuccessful white applicant had established a *prima facie* case of discrimination simply because the promotion had been awarded to a black. This application of the holding below was arguably necessary to avoid conflict with the principle that an employer has discretion to choose among equally qualified candidates so long as the choice is not based on impermissible criteria (see note 5, *supra*); for that principle would be seriously compromised if the employer's choice of one such candidate would in itself constitute a *prima facie* case of discrimination because of that candidate's race (or sex, etc.), while the choice of an alternative candidate would not. The error of the court below rests, however, in its adoption of a standard that transforms every promotion decision involving a choice among qualified candidates who differ in race, sex, religion, or national origin into an automatic *prima facie* showing of unlawful discrimination.

[8]Such evidence, which is generally available through discovery, could consist, for example, of evidence of the applicants' comparative qualifications, statistical or other evidence of the employer's practices, or some combination of such showings. Also pertinent, for example, would be whether the employer has been able to articulate a nondiscriminatory reason for the selection, in response to a discovery request. See *Furnco Construction Corp.* v. *Waters*, *supra*, 438 U.S. at 576-580. As the Court stated in *Burdine* (slip op. 5), the burden of establishing a *prima facie* case should not be onerous—for those who have a *prima facie* case.

Although individual claims of discrimination, such as those involved here and in *McDonnell Douglas*, are important in vindicating personal rights conferred by Title VII and in serving as a spur to employer self-analysis and reform (and sometimes result in injunctive relief of more general significance), progress in achieving the goals of Title VII is not accomplished principally through litigating a multiplicity of individual claims about particular employment decisions. The most substantial changes in employment patterns have typically resulted from class actions and from employer self-analysis and adoption of affirmative action plans or other systemic reforms, such as the efforts of the Postal Service to include, where feasible, at least one woman or minority person on each three-member promotion review committee that were at issue in *Page* v. *Bolger*, No. 78-1792 (4th Cir. Apr. 2, 1981) (en banc).

has based a promotion decision on an impermissible consideration simply because he has chosen among qualified persons of different races, sexes, religions or national origins.[9]

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of *Texas Department of Community Affairs* v. *Burdine*, No. 79–1764 (Mar. 4, 1981).[10]

Respectfully submitted.

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APRIL 1981

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[9] As the Tenth Circuit aptly stated, "to make out a prima facie case * * * something more is needed than proof that a qualified male was chosen over a qualified female. If nothing more is needed, we have indeed opened Pandora's box." *Olson* v. *Philco-Ford*, *supra*, 531 F.2d at 478.

[10] In the alternative, the Court may wish to give this case plenary consideration in light of the conflict in the circuits and the importance and recurring nature of the question presented. See, *e.g.*, *Page* v. *Bolger*, *supra*, slip op. 6–7; *Daye* v. *Harris*, *supra*; *Davis* v. *Weidner*, 596 F.2d 726 (7th Cir. 1979); *Powell* v. *Syracuse University*, 580 F.2d 1150 (2d Cir.), cert. denied, 439 U.S. 984 (1978); *Banerjee* v. *Board of Trustees of Smith College*, 495 F. Supp. 1148 (D. Mass. 1980).

APPENDIX A

No. 79-1574

LOUIS H. AIKENS, APPELLANT

v.

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS, APPELLEES

Appeal from the United States District Court
for the District of Columbia.

September Term, 1979

Filed July 31, 1980

Before: WILKEY, WALD and EDWARDS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment _____ of the District Court appealed from in this cause is hereby reversed and the case is remanded for further proceedings, consistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ _____
GEORGE A. FISHER
Clerk

Date: July 31, 1980

Opinion for the Court filed by Circuit Judge Edwards

Judge Wilkey dissents and will file a statement of separate views at a later date.

APPENDIX B

79–1574

LOUIS H. AIKENS, APPELLANT

v.

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS, APPELLEES

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 77–0303)

Argued April 28, 1980

Decided July 31, 1980

Before WILKEY, WALD, and EDWARDS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* EDWARDS.

Judge WILKEY dissents and will file a statement of separate views at a later date.

EDWARDS, *Circuit Judge:* Plaintiff-appellant, Louis H. Aikens, instituted this action under Title VII of the Civil Rights Act of 1964, 78 Stat. 241, 253, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e *et seq.*, seeking redress of alleged discrimination on the basis of race in his employment with the United States Postal Service. Aikens, who is now retired from the Postal Service, requested relief in the form of retroactive promotions, commensurate retroactive pay benefits, and attorneys' fees. The District Court found that Aikens had failed to make out a prima facie case of racial discrimination under Title VII and ordered that the action be dismissed with prejudice. Aikens now appeals from the District Court decision. For the reasons outlined below, we hereby reverse

the decision of the District Court and remand the matter for further proceedings consistent with our judgment in the case.

I.

Aikens is a black man who began his employment with the Post Office in Washington, D.C. in 1937. He was promoted to his first supervisory position in 1952; subsequently, between 1952 and 1960, Aikens held various jobs at the level of foreman. From 1960 to 1966, he received six promotions that raised him from the foreman level (ranked PFS–7) to the level of Assistant Director, Operations Division for Transit Mails (PFS–15). In 1974, Aikens was upgraded twice, once by virtue of a promotion and once pursuant to a "detail" (temporary assignment). Between 1966 and 1974, however, Aikens was neither detailed nor promoted above his Assistant Director position. His failure to be promoted during this latter period forms the basis of this Title VII suit.

Under applicable Postal Service procedures, an employee who desires consideration for supervisory promotions is required to indicate his job preferences on a Form 1717. Following that procedure, during the entire period from 1966 through 1973, Aikens had on file the appropriate Form 1717 seeking consideration for promotion to any Post Office position ranked above his PFS–15 job. Between 1966 and 1973, there were only four positions in the Washington, D.C. Post Office that were ranked above PFS–15. During that period, several white employees, all with less seniority than Aikens, were promoted above him. After the Job Evaluation Program in 1973, Aikens' job was rated at grade PES–20; however, following the implementation of the Job Evaluation Program, several additional positions were rated above Aikens' job and several junior white employees received details or promotions above Aikens.

Aikens filed an Equal Employment Opportunity complaint with the Postal Service on January 4, 1974. An existing Civil Service Regulation, 5 C.F.R. §713.214 (1974), required that complaints be filed within thirty days of the

alleged discriminatory action. Under this statute of limitations standard, Aikens' complaint was timely only as to four positions for which promotions or details had occurred within thirty days of the complaint; the four positions in question were Mail Processing Officer, Acting Mail Processing Representative, Director, Operations Division, and Customer Services Representative.[1] Accordingly, administrative and judicial review of Aikens' employment discrimination claim was properly focused on Aikens' failure to be promoted to these four positions.[2]

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[1] Alleging that the Postal Service's failure to promote him during the entire eight year period, from 1966 until 1974, constituted racial discrimination of a continuing nature, Aikens argues that administrative and judicial review should not have been limited to the four positions for which he filed a timely complaint. In general, plaintiffs who allege continuing violations can file charges at any time during which the continuing violation has taken place. *E.g., Rich v. Martin Marietta Corp.*, 522 F.2d 333, 348–49 n.15 (10th Cir. 1975). This theory is inapposite in this case, however, because there is no indication that Aikens was adversely affected by an employment policy or practice that consistently operated to hold him, or blacks as a class, in the lower echelons of employment. *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973); *Rich v. Martin Marietta Corp.*, 522 F.2d at 348. *But see, Cedeck v. Hamiltonian Fed. Sav. & Loan Ass'n*, 551 F.2d 1137 (8th Cir. 1977). Therefore, we consider here only the four positions for which Aikens filed a timely complaint with the Postal Service.

[2] The findings of fact in the District Court opinion also focus on Aikens' failure to be promoted to the position of Postmaster. In 1972, Aikens was one of four candidates for the position of Postmaster. Because of the pending Job Evaluation Program and a potential postal reorganization, officials delayed sending the four names to the selection board. The new job classifications established by the Job Evaluation Program made Aikens ineligible for the Postmaster position. After a new selection procedure, a black man became Postmaster of Washington, D.C. in January 1974. In light of the arguments advanced by counsel during the oral arguments in this case, we do not consider Aikens' claims of racial discrimination related to the Postmaster position.

Following an administrative review, the Postal Service concluded that the evidence of record did not support Aikens' allegation of racial discrimination. This judgment was affirmed by the Appeals Review Board of the Civil Service Commission. Aikens then filed his Title VII complaint in the District Court, which held a trial *de novo* on his claim of employment discrimination. Aikens here appeals a judgment rendered in favor of the Postal Service.

II.

In *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), the Supreme Court articulated the standard that must be met in order for individual complainants to make out a prima facie case of discrimination under Title VII:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802. The Court recognized that the varying factual situations seen in Title VII cases require the application of a flexible formulation for this prima facie proof. *Id.* at 802 n.13. In essence, *McDonnell Douglas* requires an individual bringing suit under Title VII to demonstrate that the alleged discrimination did not result from a lack of qualifications or the absence of a vacancy in the job sought. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977). Thus, it has been held that the *McDonnell Douglas* test, adopted to fit the factual circumstances of the case, applies in individual actions involving charges of race discrimination in promotion decisions. *President v. Vance*, No. 78–1226, slip op. at 24 n.78 (D.C. Cir. April 25, 1980); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 346–47 (10th Cir. 1975).

On the record in this case, it is clear that Aikens met the first, third and fourth elements of the test set forth in *McDonnell Douglas:* he is a black man; he sought promotion to higher level positions that became available; and white Post Office employees received the positions. Therefore, it is the second element of the test, having to do with Aikens' qualifications to perform the jobs here in question, that must be addressed in our consideration of this appeal.[3]

III.

Upon review of the evidence submitted to the District Court, we are convinced that Aikens offered ample evidence, which was not contested, to demonstrate his qualifications to perform the work in issue. To begin with, we note that the District Court made no finding that Aikens was not qualified for the positions in dispute. Moreover, Aikens' own record of accomplishments attests to his qualifications. He is highly educated, having earned a Master's degree and completed several years of course work towards a Ph.D. Aikens had almost forty years of experience with the Post Office, during which time he held a number of different supervisory positions. Nothing indicates that his performance was ever less than satisfactory. Indeed, his work record indicates that he participated in training and development courses and seminars designed to enhance his performance on the job.

Another indication of Aikens' qualifications was his nomination by Post Office officials for several promotions. During the selection process that occurred before the 1973 Job

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[3]We should emphasize that the question here, involving Aikens' "qualifications," concerns only the evidence necessary to make out a prima facie case. A person may be qualified to perform a job, and thus satisfy the requirements for a prima facie case under *McDonnell Douglas, supra,* and still ultimately fail on his claim of discrimination under Title VII. See Section V, *infra.* Nothing in this opinion is intended to suggest otherwise.

Evaluation Program, the Regional Office made Aikens one of the candidates for the Postmaster position. Stipulation 35. In addition, when two other positions (including one of those at issue in this case) were filled in 1972, Aikens was the second choice of the Promotion Advisory Board. Stipulation 25–26. If both the Regional Office and the Promotion Advisory Board believed him to be qualified for these higher positions, it seems unlikely that he would not be qualified for the four positions in question here.

The promotions that Aikens received in 1974 also attest to his qualifications to perform work at higher levels of employment. Only a few days after Aikens had filed his employment discrimination complaint in January 1974, he received a promotion to Area Logistics Manager, ranked at job grade PES–21. Shortly thereafter, he was detailed to the position of Assistant Manager of Distribution, PES–24. The very fact of an employee's ultimate promotion has been found to demonstrate that the employee is qualified for promotion. *Sweeney v. Board of Trustees of Keene State College*, 569 F.2d 169, 178 n.18 (1st Cir.), *vacated and remanded on other grounds*, 439 U.S. 24 (1978), *judgment of district court affirmed following remand*, 604 F.2d 106 (1st Cir. 1979).

In its factual finding number 14, the District Court focused on Aikens' unwillingness to accept lateral transfers and noted that promotion depended in part on experience previously attained in various management positions. *See also* findings 10, 13. In so finding, the District Court opinion suggests both that the experience Aikens sacrificed, by declining lateral transfers, was a requirement for promotion and that the lack of that experience reflected adversely on his ability to perform the jobs at issue here. We note, however, that the Postal Service adduced no evidence to demonstrate that experience in the particular lateral positions that Aikens declined was either a qualification required for promotion or related to the positions he sought. Without such evidence of job relatedness, we cannot conclude that Aikens' refusal to accept lateral transfers made him unqualified for promotion. *Cf. Albemarle Paper Co. v.*

Moody, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Because we find that the clear weight of the evidence indicates that Aikens was qualified to perform the jobs in question, and because the District Court did not find otherwise, we must conclude that Aikens made out a prima facie case of race discrimination pursuant to the test set forth in *McDonnell Douglas, supra.*[4]

IV.

Even if we were to find that the evidence with respect to Aikens' qualifications was unclear, we would still be re-

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[4]Two additional points require comment. Evidently relying on affidavits offered by the Postal Service, the court below found that Aikens had informed supervisors that he was interested in only two specific positions. Finding of fact number 11. This finding was offered as if to suggest that, whether or not qualified, Aikens had no interest in the disputed jobs. However, even assuming that the affidavits were properly admissible (a question which we need not address), it is clear that they were not dispositive of Aikens' claim. Aikens had filed Form 1717 to demonstrate his interest in *all* Postal Service positions higher than his own, and he had done nothing to withdraw those forms. The Postal Service had articulated no policy that foreclosed an employee from promotion to a position for which a current Form 1717 was on file, merely on the strength of his expressed interest in promotion to other positions. Because Aikens was not offered any of the four positions, he never had the opportunity to demonstrate his disinterest effectively by declining the positions. Furthermore, we cannot accept the government's contention that a plaintiff in a Title VII suit, as a part of his demonstration of qualifications, is required to describe the positions in dispute. As the Supreme Court suggested in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the burden of describing the jobs in dispute rests with the employer. The plaintiff need only prove that he is qualified for the positions the employer has described and intends to fill. We note, however, that the nature of the Postal Service jobs involved was not actually at issue here and the government did not claim that Aikens' description of the positions was inaccurate.

quired to reverse and remand this case because of certain erroneous conclusions of law in the opinion of the District Court.

In conclusion of law number 8, the District Court opinion indicates that plaintiff's claim cannot succeed because he "failed to prove that he was *as qualified or more qualified* than the individuals who were promoted or detailed" (emphasis added). Plainly, this is a misstatement of applicable law and counsel for appellee conceded as much during the oral arguments in this case on appeal. As noted above, the Supreme Court in *McDonnell Douglas, supra,* has made it clear that, in order to make out a prima facie case with respect to the qualification element, an individual complainant in a Title VII suit need only prove that he or she "was qualified for a job for which the employer was seeking applicants." 411 U.S. at 802. Nothing in *McDonnell Douglas, supra,* requires a plaintiff seeking to make out a prima facie case to prove that he was the most qualified person for the promotion in question. *See, e.g., Rich v. Martin Marietta Corp.*, 552 F.2d 333, 347 (10th Cir. 1975).

We know of no authority, and the District Court opinion cites none, to support the proposition that plaintiff was required to prove that "he was as qualified or more qualified than individuals who were promoted or detailed." Such a proposition is plainly at odds with the test enunciated in *McDonnell Douglas, supra.* Therefore, we must find that the District Court misapplied the law under Title VII when it imposed such an onerous burden with respect to the proof required of plaintiff in order to make out a prima facie case.

The second legal defect is found in conclusion of law number 7, wherein the District Court ruled that it was "critical" for plaintiff to offer "proof of discriminatory motive on the part of defendant." The District Court opinion concludes that "plaintiff has failed to provide such proof." Following this conclusion, the District Court opinion cites *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

The entire thrust of the District Court's conclusion of law number 7 reflects an obvious misapplication of the law un-

der Title VII. First, *Arlington Heights, supra,* was decided on a constitutional basis and the Supreme Court has never held that the constitutional standard for adjudicating racial discrimination claims is identical to the standard applicable under Title VII. *Washington v. Davis,* 426 U.S. 229, 239 (1976). Second, it is true that some Title VII cases do require proof of discriminatory motive, *see International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977), and a showing of motive may constitute plaintiff's proof that the allegedly legitimate employment consideration articulated by the defendant is merely a pretext for unlawful discrimination. However, the prima facie case in a suit alleging individual discrimination does not require a showing of discriminatory motive. *McDonnell Douglas, supra,* which established the elements of the prima facie case, simply does not impose that burden on the plaintiff.

V.

Since the plaintiff made out his prima facie case, which raises an inference of discrimination, the burden now shifts to the defendant, under the standards of *McDonnell Douglas, supra.* The government may meet Aikens' prima facie showing by articulating a legitimate, nondiscriminatory reason for its failure to promote Aikens to the four positions at issue here. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). The government's burden is "that of proving that [they] based [the] employment decision on a legitimate consideration, and not an illegitimate one such as race." *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577 (1978).

Accordingly, the government is now to be given the opportunity to offer the required proof concerning the legitimacy of the promotion decisions here at issue. At trial, no evidence indicated that the white employees who received promotions to the four positions at issue were as, or more, qualified than Aikens for those jobs. That evidence may be offered on remand, along with other evidence that is relevant and material in rebutting Aikens' prima facie case of discrimination.

Should the government succeed in meeting its burden, Aikens shall then have the opportunity to introduce evidence that the justifications offered by the Postal Service are merely pretexts for discrimination. *Furnco Construction Corp.*, 438 U.S. at 578; *McDonnell Douglas*, 411 U.S. at 804–805.

Because we find that Aikens made out his prima facie case of racial discrimination and that the District Court applied incorrect principles of law in considering plaintiff's case, we reverse the order of the District Court and remand the case for further proceedings consistent with this opinion.

It is so ordered.

79-1574

LOUIS H. AIKENS, APPELLANT

v.

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS, APPELLEE

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 77-0303)

Argued 28 April 1980

Decided 31 July 1980

Dissent filed 9 September 1980

Before WILKEY, WALD, and EDWARDS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* EDWARDS on 31 July 1980.

WILKEY, *Circuit Judge*, dissenting: On 31 July 1980 the majority of this panel reversed a district court ruling which had granted summary judgment to defendants-appellees in this Title VII suit on grounds of appellant's failure to make out a prima facie case of racial discrimination. The panel opinion found two errors of law in the district court's decision, first in its statement that it was "critical" for plaintiff-appellant to show racially discriminatory motive on the part of defendant, and second in its requirement that, to make a prima facie case, plaintiff must show he was "as qualified or more qualified than individuals who were promoted or detailed."[1]

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[1] *Aikens* v. *United States Postal Serv.*, No. 79-1574, slip op. at 9-10 (D.C. Cir. 31 July 1980).

In addition, the panel majority made its own assessment of the factual issue of appellant's qualifications. The majority looked primarily to the Supreme Court's standard in *McDonnell Douglas Corp.* v. *Green*, which held that a Title VII plaintiff can establish a prima facie case of racial discrimination by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[2]

Of these criteria only the second, in its requirement that plaintiff be "qualified," is at issue in this case. The panel majority concluded that the weight of evidence on record so clearly indicated plaintiff's qualifications for the jobs in question that this court could hold plaintiff to be "qualified" without remanding the issue for a district court finding based on the proper standard.

I agree with the majority that the district court applied an inappropriate legal standard in ruling that it was critical for plaintiff to prove discriminatory motive on the part of defendant. Although the Supreme Court has stated that for "disparate treatment" cases of this sort proof of discriminatory motive is "critical,"[3] the Court has allowed such motive to be proven indirectly in certain circumstances, by in-

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[2] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973).

[3] *International Bhd of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). The present case is an instance of alleged disparate treatment on grounds of race, rather than one of "disparate impact," which involves "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.*

ference from "the mere fact of differences in treatment."[4] Because the district court's opinion appears to require direct proof of discriminatory motive, I concur with the majority insofar as they vacate the district court's grant of summary judgment on this erroneous legal basis.

I strongly disagree, however, with the majority's treatment of the standard for permissible indirect proof of discriminatory motive and its rationale. The Supreme Court intended its *McDonnell Douglas* standard to identify those situations where, based on plaintiff's initial evidence, the employer's decision appeared "more likely than not" to be a discriminatory one.[5] For the standard to accomplish this goal, the Court acknowledged that it must be applied flexibly, since in light of variations in circumstances of Title VII suits, the specified standard "is not necessarily applicable in every respect to differing factual situations."[6]

In the present case the majority has applied the second *McDonnell Douglas* criterion inflexibly with an irrelevant and mechanical standard of "qualification" that bears little relationship to plaintiff's ability to perform well in the managerial positions in question. As a result the majority's concept of a prima facie case has little if anything to do with the likelihood that defendant denied a position to plaintiff for racially discriminatory reasons, which is what the *McDonnell Douglas* standard is supposed to determine. Although this approach finds support in some other lower court opinions, the present case illustrates a potential for the application of the *McDonnell Douglas* standard to lose

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[4] *Id.*

[5] *Furnco Constr. Co.* v. *Waters*, 438 U.S. 567, 576 (1978). *See International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 357–58 & n.44 (1977); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 801–02 (1973).

[6] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 n.13 (1973).

touch with its purpose. Far from this outcoming being required by the Supreme Court's decisions in this area, it is not consistent with the reasoning of those decisions. I therefore feel compelled to detail my disagreement with the majority's approach and set forth a more appropriate alternative consistent with the purpose of the *McDonnell Douglas* test.

The four positions to which appellant sought promotion by the Washington, D.C., Post Office are managerial in nature. Appellant was already among the highest ranking officers in the D.C. Post Office when he applied for promotion to the four positions of Mail Processing Officer, Acting Mail Processing Representative, Director of the Operations Division, and Customer Services Representative.[7] To be "qualified" for any managerial position at this level requires above all that one have managerial ability—an ability to supervise, direct, and cooperate with others; a personal sense of responsibility and initiative; an ability to motivate other persons; and a familiarity with the substantive area of activity for which one is responsible. Such traits of managerial ability are intangible and defy measurement by "objective" means using figures or paper credentials.

To assess plaintiff's qualifications for these positions, however, the majority inexplicably did look first to paper credentials, citing appellant's Master's degree, course work towards a Ph.D., forty years experience in the Post Office, including supervisory positions, performance ratings not less than satisfactory, and participation in performance-enhancing courses and seminars. The majority also noted that appellant had been nominated as a candidate for D.C. Postmaster by the Regional Office (though the list recommended by the District Office did not include him).[8] In addition, appellant was the second choice of the Promotion

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[7] *Aikens* v. *Bolger*, No. 77-0303, Findings of Fact ¶¶5, 9 (D.D.C. 26 Feb. 1979).

[8] *See id.* ¶21.

Advisory Board for two other positions, and he was promoted subsequent to the events at issue here.[9]

The problem with assessing qualifications based on such quantifiable, "objective" criteria is that these criteria bear very little relationship to an employer's real-life decision about which candidate he would prefer for a managerial position. That decision must typically be based much more on a comparative assessment of the subjective managerial talents of candidates than on the basis of objective paper criteria. To say that a candidate meets certain minimal objective criteria for a managerial position says virtually nothing about whether a nondiscriminatory employer would choose him over other candidates. As a result, a judicial determination that a Title VII plaintiff is "qualified" in this sense for a managerial position says virtually *nothing* about whether the employer's decision is "more likely than not" to be a racially discriminatory one which is the issue to be determined at the time tests for a prima facie case are applied.

Of course this problem is apt to occur inevitably when one assesses qualifications for a managerial position according to an absolute test rather than a comparative test. If one looks only at the absolute qualifications of the individual isolated from his qualifications relative to other candidates, one is artificially limited to the objective, quantifiable type of criteria: even if they are not significant for real-life decisions, at least they are "something" for a court to go by.

But this dilemma occurs only if we rule out the possibility of a relative assessment of the less tangible qualifications of the various candidates for a managerial position. By a comparative technique one can assess how well one candidate has performed in the past compared to another candidate: compare the performance of organizational units for which the candidates were responsible, compare the subjective

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[9] *Aikens* v. *United States Postal Serv.*, No. 79–1574, slip op. at 6–7 (D.C. Cir. 31 July 1980).

evaluations from their supervisors in the past, or perhaps compare their general reputations among those for whom they worked. This type of comparison would bear at least some relationship to employment decisions made in the real world. If a court found that a minority candidate was approximately as qualified as a nonminority candidate in this sense, the finding truly would bear some relation to the likelihood that the employer made his decision based on discriminatory racial grounds.

The district court attempted to do precisely this in requiring plaintiff to make some showing that he was "as qualified or more qualified than the individuals who were promoted or detailed."[10] The majority rejects this approach for lack of authority, and it is true that appellee's counsel was unable to cite authority for such an approach at oral argument.

But I cannot agree that the district court's approach is "plainly at odds" with the *McDonnell Douglas* test.[11] The *McDonnell Douglas* Court acknowledged the flexibility necessary if its prima facie case standard is to serve its intended purpose,[12] and further disclaimed any intent to set a specific test for evaluating employment qualifications. On the contrary, the Court expressed a concern that qualifications tests "bear a demonstrable relationship to successful performance of the jobs."[13] More recently, the Court has stated that relative as well as absolute assessment of qualifications is relevant to the *McDonnell Douglas* standard. The Court explained that under *McDonnell Douglas* plaintiff proves discrimination indirectly by presenting evidence

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[10] *Aikens* v. *Bolger*, No. 77-0303, Conclusions of Law ¶ 8 (D.D.C. 26 Feb. 1979).

[11] *Aikens* v. *United States Postal Serv.*, No. 79-1574, slip op. at 9 (D.C. Cir. 31 July 1980).

[12] *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 n.13 (1973).

[13] *Id.* at 802 n.14 (quoting *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971)).

to exclude the two most common nondiscriminatory reasons for an employer's rejection of a candidate: "an absolute *or relative* lack of qualifications or the absence of a vacancy in the job sought."[14]

In light of the purpose of the *McDonnell Douglas* test and the realities of employment decisions, this language should not be ignored, despite the lack of lower court cases that have followed the relative qualifications branch of this standard. The fact is that some employment decisions are made primarily by absolute, noncomparative criteria, while others depend predominantly on relative qualifications in a comparison among candidates. The former approach applies generally for positions that require objectively verifiable skills; if the applicant meets the objective standard for employment, he is "qualified." The relative approach, on the other hand, applies to positions requiring traits that can only be evaluated subjectively, by comparison with other candidates; in this category managerial positions are the clearest example.

Under a comparative approach, plaintiff need not show that he was the most qualified candidate, only that he was approximately as qualified in light of comparative criteria. Although this is necessarily a somewhat vague standard that requires discretion on the part of the trial court, the absolute standard is also vague and discretionary when applied to cases that involve managerial positions with qualifications that cannot be stated in terms of objective criteria. The essential difference is that the relative standard is a discretionary one bearing some relation to actual hiring decisions for managerial positions, while the absolute standard is a discretionary one bearing little or no relation to actual managerial hiring decisions.

Significantly, the Supreme Court's application of the absolute qualification approach has in fact been in the context of positions with objectively verifiable skills; hence the ma-

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[14] *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977) (emphasis added).

jority's opinion here represents an unthinking extension of Supreme Court doctrine, an extension which is inconsistent with the doctrine's overall purpose. *McDonnell Douglas* involved a plaintiff who had been fired from a job as a mechanic and laboratory technician.[15] For such a job, the ability to perform the required skills can be objectively verified, far more easily at least than for a manager. Similarly, in *Furnco Construction Corp.* v. *Waters*,[16] the Court applied the *McDonnell Douglas* standard in the context of bricklayers,[17] for whom one could judge qualifications in objective, verifiable terms of ability and experience in performing a particular task. So long as we are dealing with nuts, bolts, and bricks, the majority approach would doubtless work well to identify discriminatory hiring practices.

To extend an absolute qualifications approach to managerial positions, however, not only defeats the purpose of the *McDonnell Douglas* standard, but also leads to distorted and unjust results. If courts establish minimal objective criteria for qualifications in managerial positions,[18] *then any supervisory employee satisfactorily performing his present job can claim to be "qualified" in this vague sense for promotion to the next higher position.* The consequences are clear for any employer who contemplates promoting a superior nonminority employe over a marginally qualified minority employee: since the minority employee will automatically be able to make out a prima facie case of discrimination, it will make no sense for the employer to promote the superior candidate over the marginal candidate unless he has available sufficient resources of time and money to rebut the prima facie case in extended litigation.

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[15] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 794 (1973).

[16] 438 U.S. 567 (1978).

[17] *See id.* at 569–71.

[18] *See, e.g., Rich* v. *Martin Marietta Corp.*, 522 F.2d 333, 347–48 (10th Cir. 1975).

The only alternative strategy for the employer would be to devise some type of "objective" qualifications test for managerial employees, which would preclude a prima facie case by showing that those passed over for managerial positions were not "qualified." But the difficulty, not to say impossibility, of devising an objective test to identify those who would be best in a managerial position, simply highlights the absurdity of using an absolute, objective test rather than a relative one to determine managerial qualifications under *McDonnell Douglas*.

We recognize, of course, that comparative criteria may always come into evidence at the stage of a Title VII suit at which defendant attempts to rebut plaintiff's prima facie case. As a matter of theory this may seem of equal value to a relative qualifications approach used at the threshold stage of assessing the sufficiency of plaintiff's prima facie case. But as a practical matter of litigation expense, the former is likely to be significantly more costly than the latter. To impose this added expense of making an affirmative defense on a defendant, who has not even been shown more likely than not to have discriminated, is neither fair nor consistent with usual trial procedure.

It should be recognized that a relative test of qualifications would generally be more difficult to satisfy than an absolute, objective test. But this merely corresponds with the fact that racial discrimination is by nature more difficult to prove by indirect evidence for a highly subjective decision—such as the hiring of managers—than for decisions made according to objective and verifiable criteria. Courts must weight the danger of unpunished discriminatory decisions in the hiring of managers, against the unfairness of subjecting innumerable innocent employers to the cost of overcoming a prima facie case built on thin air. By applying a relative qualifications test where appropriate, courts at least conform their decisions to the realities of hiring decisions and thus increase the probability of just results.

By contrast, the use of an absolute test of qualifications for managerial positions can easily force the burden of

rebutting a prima facie case upon an employer who has never come close to making a discriminatory hiring decision. Even an employer who actively favors minority applications could come under the gun, if he just once passed over a marginal minority candidate for promotion to a managerial position in favor of a highly qualified nonminority candidate. The potential for a standard to lead to such possible injustice should give us pause.

In the present case we do not know whether defendant discriminated in its promotion decision. The possibility that we may be finding a prima facie case against a totally nondiscriminatory employer is suggested, however, by the district court's findings that (1) during the period in question "blacks as well as whites were promoted or detailed to positions above plaintiff's position," (2) there has been a considerable increase in the number of high level black employees in the D.C. Post Office during and since the period covered by the complaint, and (3) at the present time "almost all high level positions are held by blacks."[19]

On the present record it is unclear whether plaintiff was as qualified as other candidates for the managerial positions in question. I would remand to the district court for a finding on this issue based on relative as well as absolute criteria of qualification, but not requiring direct proof of discriminatory motive on the part of defendant. I therefore dissent from the majority's entering a finding of qualification instead of remanding this issue to the district court.

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[19] *Aikens* v. *Bolger*, No. 77-0303, Findings of Fact ¶¶ 15-16 (D.D.C. 26 Feb. 1979).

APPENDIX C

No. 79–1574

LOUIS H. AIKENS, APPELLANT

v.

U.S. POSTAL SERVICE BOARD OF GOVERNORS, ET AL.

United States Court of Appeals
For uthe District of Columbia Circuit

September Term, 1980

Civil Action 77–0303

Filed Nov. 20, 1980

Before: WILKEY, WALD and EDWARDS, *Circuit Judges*

ORDER

Upon consideration of the petitions for rehearing filed herein by appellant and by appellees, it is

ORDERED by the Court that both petitions for rehearing are denied. Inasmuch as appellees' petition indicates some confusion about the meaning to be ascribed to the original opinion of this Court, a short clarifying statement is attached hereto.

Per Curiam
For the Court:

/s/ _____
GEORGE A. FISHER
Clerk

Memorandum Opinion *Per Curiam*

Separate statement by Circuit Judge Wilkey

APPENDIX D

No. 79-1574

LOUIS H. AIKENS

v.

UNITED STATES POSTAL SERVICE

Nov. 20, 1980

MEMORANDUM

Before WILKEY, WALD, and EDWARDS, *Circuit Judges*.

PER CURIAM: The Government and the appellant have petitioned this court for a rehearing in this case. We hereby deny their petitions for the reasons set forth in the majority opinion issued by this panel on July 31, 1980. In addition, since Government's petition indicates some confusion about the meaning to be ascribed to the original opinion of this court, we have set out a short clarifying statement.

The Government petitions for rehearing because it fears that this court has misunderstood the decision of the District Court. In its Findings of Fact (FOF) and Conclusions of Law (COL),[1] the trial court recited the burdens of proof that a plaintiff and defendant face in the course of a Title VII trial. The District Court correctly noted that a plaintiff must first make out a prima facie case of discrimination, COL ¶ 4, App. at 23, after which the burden of going forward falls on the defendant, who must show some legitimate nondiscriminatory reason for the action complained of. COL ¶ 5, App. at 23. If the defendant meets his burden, the "ultimate burden of proof rests upon the plaintiff." COL ¶ 6, App. at 23. The Government asserts that the trial court found that the Government had met its burden of proof and

[1] The trial court's findings and conclusions were filed February 26, 1979. They are reproduced in full in Appellant's Appendix ("App.") at 14.

that the plaintiff had not met his "ultimate burden." Indeed, the Government's petition for rehearing is premised on these assertions both of which we find to be erroneous. We simply do not read the trial court's opinion as reaching the conclusions here advanced by the Government.

In the concluding paragraphs of the Conclusions of Law, the District Court stated that "Plaintiff has failed to provide" proof of discriminatory motive, COL ¶ 7, App. at 24, and that

> 8. The Court finds that plaintiff has failed to present a *prima facie* case of racial discrimination in that plaintiff failed to prove that he was as qualified or more qualified than the individuals who were promoted or detailed. Plaintiff has further failed to demonstrate that the reclassification of his position or the processing and final outcome of his appeal of the reclassification were in any way the products of racial discrimination.

COL ¶ 8, App. at 24. We read the trial court's opinion as finding only that the plaintiff had failed to make out a prima facie case. We do not read the lower court opinion as making any findings on whether the defendant met his burden of going forward and, if so, whether the plaintiff carried the ultimate burden of proof.

The majority opinion in this case specifically rejected the trial court's finding that the plaintiff had failed to make out a prima facie case. *See Aikens v. United States Postal Service*, 79–1574, slip op. at 8 (July 31, 1980). Consequently, because the trial court made no express findings on whether the defendant met its burden of proof or, even if it had, whether the plaintiff had met his burden on rebuttal, we remanded the case for further proceedings.

A review of the record indicates that the District Court held a full trial on the merits of this case. However, this court can only review those findings of fact and conclusions of law that the trial court actually made. We need not, and should not, parse through the record to guess whether the defendant has met his burden in this case. It is the job of

the trial court to make the necessary findings of fact and conclusions of law. *See* Rule 52(a), Federal Rules of Civil Procedure.

Our opinion remanded the case "for further proceedings consistent with this opinion." Slip op. at 11. On remand the trial court should make findings and draw conclusions on whether the defendant has met its burden of proof, i.e. whether the defendant has "articulate[d] some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *See Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). If, and only if, the trial court expressly finds that the defendant has met its burden, then the court should make a finding as to whether the plaintiff has met his burden of showing that the defendant's reason "was in fact pretext." 411 U.S. at 804. *See Furnco, supra*, 438 U.S. at 578 ("The plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination.") We leave it to the District Court to determine whether these findings can be made on the present record.

No. 79-1574

AIKENS

v.

UNITED STATES POSTAL SERVICE

WILKEY, *Circuit Judge:* In the original review of this appeal the views expressed in both the majority opinion and my dissent turned on our very particular analysis of what constitutes a prima facie case of racial discrimination under *McDonnell Douglas*. Though I disagreed with the majority's excessively lenient view of what "qualifications" a Title VII plaintiff must demonstrate to make out a prima facie case, I concurred in the remand because it did appear that the district court predicated its finding of no prima facie case on an erroneous conclusion. That court mistakenly interpreted the case law as requiring *direct proof* of discriminatory motive. The district court, however, conducted a full trial notwithstanding its finding that the plaintiff failed to establish a prima facie case. In other words, now postulating the existence of a prima facie case, the trial judge should have little difficulty in framing explicit conclusions under the remaining *McDonnell Douglas* constructs; (a) Did the defendant come forward with a legitimate, nondiscriminatory reason for not promoting the plaintiff? If so, then, (b) did the plaintiff show that the asserted reason was a mere pretext for discrimination?

At the close of plaintiff's case, the defendant made a Rule 41(b) motion for a directed verdict claiming that the plaintiff had failed to make out a prima facie case. Since the trial judge *denied* this motion, and required the defendant to go forward, it is likely that the judge would now have at his disposal evidence and testimony sufficient to undertake express analysis according to the two remaining *McDonnell Douglas* rubics. In fact, it appears that both parties spoke their piece at trial on the issue of job-related discrimination. It also appears that the trial judge did actually evalu-

ate the proffered testimony and evidence in light of *McDonnell Douglas*' pattern of shifting burdens of going forward. The trial judge found that

> [a]fter the presentation of such a *prima facie* case, *the burden of going forward falls on the defendant.* This burden is met if either *discrimination is shown to have not existed* or if *some legitimate nondiscriminatory reason* for the action complained of can be shown to exist. . . .

Conclusion of Law ¶ 5, *reprinted in* Appendix at 23 (emphasis added). So, even though "the trial court made no *express* findings on whether the defendant met its burden," *see* Memorandum (per curiam) *ante* (emphasis added), the trial judge did find that the "[p]laintiff . . . *failed to demonstrate* [*that his complaints*] *were in any way the products of racial discrimination*," Conclusion of Law ¶ 8, *reprinted in* Appendix at 24 (emphasis added). By reading Conclusions of Law ¶¶ 5 and 8 together, and focusing on the trial court's explicit finding of *no racial discrimination* on any level, we can see that the defendant's *McDonnell Douglas* burden of going forward figured prominently in the trial and decision below.

The confusion here derives from the narrow focus of our appeal which was confined to the "qualifications" aspect of a prima facie case; a factor which is an initial consideration within a Title VII lawsuit. The plaintiff's action, it is now clear, was *not* terminated because of the district court's decision against him on the question of prima facie case. This negative holding on prima facie case would normally be a conclusive threshold question, but here, apparently, it was not, as a *full trial* was held.

APPENDIX E

Civil Action No. 77-0303

LOUIS H. AIKENS, PLAINTIFF

v.

WILLIAM F. BOLGER, DEFENDANT

Feb. 26, 1979

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having been tried by the Court on January 2, 1979 through January 3, 1979, and the Court having considered the testimony of the witnesses, various exhibits admitted in evidence and the applicable law, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This case arises under Section 717 of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. 2000e *et seq.*

2. Plaintiff, a black male, was an employee of the U.S. Postal Service (and its predecessor organization) in Washington, D.C. at all times pertinent to this complaint, and alleges in his Complaint that he is a victim of unlawful employment discrimination on account of his race.

3. The defendant is William F. Bolger, the present Postmaster General, who is the head of the U.S. Postal Service, an independent establishment in the Executive Branch of the U.S. Government.

4. On February 18, 1977, plaintiff filed this action under Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e *et seq.* for alleged racial discrimination in Federal employment. Plaintiff seeks a retroactive promotion, retro-

active pay based on the promotion, increased payments into the retirement fund, increased insurance, and reasonable attorney's fees and costs.

5. Plaintiff filed an Equal Employment Opportunity complaint with the defendant on January 4, 1974. Defendant's Exhibit A, Administrative Record (Record), Appeals Review Board Decision at p.1. Civil Service regulations require that a complaint be filed within 30 days of the alleged discriminatory act, 5 CFR 713.214. Plaintiff failed to file timely complaints except with regard to promotions or details to the following positions:

> Mail Processing Officer—effective December 13, 1973.
>
> Acting Mail Processing Representative—effective January 9, 1974.
>
> Director, Operations Division—effective February 17, 1973 and renewed every 90 days to the complaint.
>
> Customer Services Representative—effective January 12, 1974.

As a result, at the proceeding before the Civil Service Commission, only those four agency actions were considered because they were the only ones for which a timely complaint had been filed. Record, at pp. 1–2 of the Findings and Recommended Decision.

Plaintiff was aware of the E.E.O. complaints process. He was chairman of the Postmaster's E.E.O. Committee for a period of three years, and at the time he filed his complaint he had been the E.E.O. Administrative Officer for the District of Columbia Post Office for approximately two years.

Plaintiff admits that he did not file a complaint after each alleged discriminatory act, that he filed only one complaint, and that he was aware of the resulting limitations placed by the Civil Service Commission upon the issues to be considered in his complaint.

6. By decision dated December 3, 1975, and following an investigation (including a three-day hearing before a Com-

plaint's Examiner), the United States Postal Service found that the evidence of record did not support complainant's allegation of race discrimination. Based on the record before it, the Postal Service decision was affirmed by the Appeals Review Board of the United States Civil Service Commission on January 13, 1977. Record, Decision of the Appeals Review Board, pp. 1, 6.

7. Plaintiff alleges in his complaint that he was discriminated against because he was denied promotions and details during the period from August, 1966, and thereafter, because his position was reclassified making him ineligible for the Postmaster's position, because his appeal of the reclassification was delayed, and because various individuals interfered with and misled investigations into plaintiff's allegations of race discrimination.

8. During plaintiff's tenure with the Post Office he received numerous promotions, transfers, and details, including the following:

1960—Promoted from Foreman-7 to Foreman-9.

1962—Promoted to Methods and Standards Analyst-10

1964—Promoted to Assistant Tour Superintendent-11

1965—Lateral transfer to Superintendent of Main Window Service

1966—Promotion to Tour Superintendent-13

1966—Promotion to Assistant Director for Transit Mails-15

1974—Promotion to Area Logistics Manager-21

1974—Detailed to position of Assistant Director for Operations-24

9. As a result of these promotions, prior to March, 1973, plaintiff was the fifth highest ranking individual in the District of Columbia Post Office.

10. During the period 1966 to 1974, plaintiff was offered and refused the following positions:

a. Director of Finance—a lateral transfer

b. Director of Personnel—a lateral transfer

c. Quality Control Officer—promotion from 20 to 21

d. Assistant Tour Superintendent—promotion from 20 to 21.

11. Plaintiff informed his supervisors that he was only interested in the positions of Director of Installation and the Postmaster of the District of Columbia. The Director of Installation position was occupied by another individual at the time this notice was given.

12. Plaintiff refused the position of Director of Personnel because he stated he would "hate to have to start boning up on personnel in order to take over a new division."

13. The experience which plaintiff would have gained if he had accepted the positions of Director of Finance and Director of Personnel would have provided plaintiff with a broader background in all phases of Post Office work. If plaintiff had demonstrated satisfactory performance in these positions, it would have been of considerable advantage to him in being considered for other positions.

14. Experience in a variety of positions with the Post Office was considered important because it was thought to increase an individual's management abilities and thus provide an opportunity to become familiar with the overall operation of the system. Individuals who accepted positions in various management levels were more likely to receive promotions or details to other positions. Although not required to take all positions which were offered, individuals who refused such offers were considered by management to be satisfied with their positions. Conversely, if one accepted the various management positions offered, this would support one being considered for advancement.

15. Plaintiff produced no evidence that he was treated any differently because of his race. During the period in question, other blacks as well as whites were promoted or detailed to positions above plaintiff's position. A black was

selected for the position of Postmaster of the District of Columbia in January, 1974, a position which plaintiff contends he was not selected for because of his race.

16. During the period covered by this complaint and continuing to the present, there was a considerable increase in the number of black employees occupying high level positions in the District of Columbia Post Office. At the present time almost all high level positions are held by blacks.

17. Plaintiff produced no credible evidence that he was as qualified or more qualified than other individuals who were detailed or promoted during the period in question.

18. Plaintiff produced no evidence of specific acts of discrimination against him.

19. It was not unusual for the Postal Service to use details to fill positions and the Postal Service regulations provide for such details. Details of individuals during this time period were conducted in accordance with the regulations established by the Postal Service. If extensions of details were required, appropriate authorization was obtained.

20. Plaintiff produced no evidence that any individuals interfered with or misled investigations into plaintiff's allegations of race discrimination.

21. In July 1972, the District Manager, Carlton Beall, recommended a list of three persons for the position of Postmaster of the District of Columbia, one of whom was black, William Gordon. The Regional Office added the plaintiff's name to the list. The list of recommended candidates was not forwarded from the Regional Office to Headquarters for a final decision at that time. It was considered desirable to delay the selection because:

1. the Job Evaluation Program was being implemented and could result in changes in job classifications which might change the qualifications of the candidates, and

2. a reorganization was being considered which would reunite the position of Postmaster and District Manager.

Both of these events would have had a direct impact on the selection of an individual for the Postmaster's position.

22. As a result of the Job Evaluation Program (JEP) plaintiff's position was ranked at a Grade 20. The Postmaster position was ranked at Grade 29. In order to be eligible for consideration, an individual needed to be within six grades of the Postmaster's grade. As a result of the JEP, plaintiff was no longer eligible to be considered for the Postmaster's position.

23. Thereafter, a new selection procedure was commenced and the District Manager, Carlton Beall, submitted the same three names for consideration, which had been submitted in July 1972, including William Gordon, a black. The regional office added Martin Simms, the Postmaster of Jamaica, New York, who is black. Mr. Simms was selected and assumed the Postmaster's position in January, 1974. Following Mr. Simms' retirement, William Gordon, a black originally recommended by Carlton Beall, was selected as the Postmaster for the District of Columbia.

24. It was not unusual for someone outside the region to be selected as Postmaster. This occurred in several large cities, including Pittsburgh, Buffalo and Philadelphia.

25. It was likewise not unusual for the selection of Postmasters to be delayed during this period. This occurred in other cities such as Pittsburgh and Buffalo because of the initiation of the JEP program or because of the reorganization of the dual district manager - postmaster positions.

26. Individuals involved in the selection of the Postmaster position were not involved in the JEP program. Final selections for postmasters were made at the National Headquarters and no one from the District of Columbia Post Office or the Regional Post Office attempted to influence the National Headquarters staff after the initial District submissions of the three candidates. In particular, no one from the District of Columbia Post Office or the District Office requested that the selection process be delayed.

27. The Job Evaluation Program was designed to ensure comparability between the Postal Service and the private

sector and to establish standardized position description throughout the country. Standard position descriptions for similar positions were developed after interviews and studies were conducted around the country. At the time the standard position descriptions were being formulated, there were a total of twelve persons occupying the position of Assistant Director, Transit Mails throughout the country. Of that number, six incumbents were interviewed, including those in Pittsburgh, Philadelphia, Seattle, and Detroit. A standard job description was developed for that position rated at a PES–20 and all persons were rated at a PES–20, including the plaintiff.

28. Almost all postal service positions were converted on March 3, 1973 to the ratings established by JEP. Many individuals were dissatisfied with the evaluation and filed appeals. In May, 1974, approximately 1,900 appeals from the JEP were pending. As a result, the delay which occurred in the processing of the plaintiff's appeal was not unusual.

29. Plaintiff's appeal was reviewed and his appeal was denied. It was determined that his position was within the standard position description established for all Assistant Directors for Transit Mail throughout the country. The appeals process took into consideration the fact that certain events were going to occur. For example, the beltway terminal and railroad post office were to be discontinued and the bulk mail center facilities would be started. Furthermore, when JEP went into effect it was not unusual to have inconsistencies in reporting relationships such as having a PES 22 report to a PES 20.

30. Three other positions in the District of Columbia Post Office which were assigned to a grade 15 before JEP were assigned to a grade 23 after JEP, however, these positions differed from the position of Assistant Director for Transit Mails.

31. At the time the JEP appeal was processed, it does not appear that anyone handling the appeal knew plaintiff's race, or that he was being considered for the Postmaster position. The appeal was not intentionally delayed and it

does not appear that anyone processing the appeal was contacted by anyone in the District of Columbia Post Office or the District Office. There is no evidence that the plaintiff was discriminated against in the processing or ultimate outcome of the appeal because of his race.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action pursuant to 42 U.S.C. § 2000c–16(c). *Chandler* v. *Roudebush*, 425 U.S. 840 (1976).

2. Although evidence of discrimination occurring prior to the effective date (March 24, 1972) of the 1972 Amendments to Title VII of the Civil Rights Act of 1964 may be relevant, no violation of Title VII arises from pre-Act conduct. *Hazelwood School District* v. *United States*, 433 U.S. 299, 309–310 (1977).

3. A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the Civil Rights Act of 1964 was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it has no present legal consequences. *United Air Lines* v. *Evans*, 431 U.S. 553 (1977). Failure of a postal service employee to comply with the filing provisions of the Civil Rights Act of 1964 may result in dismissal of the action. *Adams* v. *Bailar*, 426 F. Supp 263 (1976).

4. The plaintiff has the burden of proving discrimination by a preponderance of the evidence in an action arising under 42 U.S.C. 2000(e)–16. *Hackley* v. *Roudebush*, 520 F.2d 108, 117–118 (D.C. Cir. 1975). Such proof is initially provided by the presentation of a *prima facie* case of discrimination, the elements of which vary depending upon the nature of the discrimination alleged. See generally, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 798 (1972); *Causey* v. *Ford Motor Co.*, 516 F.2d 416 (5th Cir. 1975).

5. After the preesentation of such a *prima facie* case, the burden of going forward falls on the defendant. This

burden is met if either discrimination is shown to not have existed or if some legitimate nondiscriminatory reason for the action complained of can be shown to exist, *i.e.*, if the allegedly discriminatory act would not have occurred "but for" discrimination. *Day* v. *Matthews*, 530 F 2d 1083 (D.C. Cir. 1976).

6. The ultimate burden of proof rests upon the plaintiff. It is not enough for plaintiff to show that he is black and was somehow injured in his employment status. *Toliaferro* v. *Bailar*, unreported, Civil Action No. 75-2137. (D.C.D.C., September 15, 1976). Rather, it is necessary to demonstrate by a preponderance of the evidence that the defendant's personnel actions were attributable to discrimination on the basis of race.

7. Critical to this showing is proof of discriminatory motive on the part of defendant. *Teamsters* v. *United States*, 421 U.S. 324, 335 at n.15 (1977).

Plaintiff has failed to provide such proof in that he has failed to show that defendant has (a) followed a pattern of actions unexplainable on nondiscriminatory grounds, and (b) departed from normal procedural standards in his treatment of plaintiff, *Village of Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252 (1977)

8. The Court finds that plaintiff has failed to present a *prima facie* case of racial discrimination in that plaintiff failed to prove that he was as qualified or more qualified than the individuals who were promoted or detailed. Plaintiff has further failed to demonstrate that the reclassification of his position or the processing and final outcome of his appeal of the reclassification were in any way the products of racial discrimination.

/s/GEORGE L. HART, JR.

United States District Judge

APPENDIX F

Civil Action No. 77-0303

LOUIS H. AIKENS, PLAINTIFF

v.

WILLIAM F. BOLGER, DEFENDANT

Order of Dismissal

Upon consideration of the Findings of Fact and Conclusions of Law filed herein, this date, it is by the Court this *26th* day of *February*, 1979

ORDERED: That this action be and the same is hereby dismissed with prejudice.

/s/ George L. Hart, Jr.

GEORGE L. HART, JR.
United States District Judge

APPENDIX G

Civil Action No. 77–0303

LOUIS H. AIKENS, PLAINTIFF.

v.

WILLIAM F. BOLGER, DEFENDANT.

JUDGMENT ON FINDING OF COURT

This cause having come on for trial before the Honorable George L. Hart, Jr., and the issues having been duly heard and Findings of Fact and Conclusions of Law having been filed, it is this 26th day of February, 1979,

ORDERED AND ADJUDGED that judgment is entered in favor of the defendant, William F. Bolger and against the plaintiff, Louis H. Aikens.

/s/ _____
JAMES F. DAVEY,
Clerk

By /s/ _____
DEAN F. MILLER
Deputy Clerk